80-814

No.

Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SAFEWAY STORES, INCORPORATED,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

WESLEY J. FASTIFF
COUNSEL OF RECORD
KATHLEEN M. KELLY
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street
20th Floor
San Francisco, CA 94108
Telephone: (415) 433-1940
Attorneys for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED

1. Should this Court's decision in *N.L.R.B. v. Acme Industrial Company,* 385 U.S. 432 (1967) be applied so as to compel an employer to produce immense documentation relevant to a matter which may well prove non-arbitrable after a brief proceeding on this threshold issue?

TABLE OF CONTENTS

	Page
Question presented	i
Opinions below	2
Jurisdiction	2
Statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	4
A. This court's decision in N.L.R.B. v. Acme Industrial Company was given an unforeseen and incorrect application in the present case	4
Conclusion	14

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES CITED

Cases

	Page
Allied Poultry Processors Company v. Polin, 134 F. Supp. 278 (D.Del. 1955)	13
Collyer Insulated Wire, 192 NLRB 837 (1971)	9
N.L.R.B. v. Acme Industrial Company, 385 U.S. 432 (1967)	passim
N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404 (1962)	5
O'Brien v. Avco Corporation, 309 F.Supp. 703 (S.D. N.Y. 1969)	13
Universal Camera v. N.L.R.B., 340 U.S. 474 (1951)	5

Rule

Federal Rules of Civil Procedure, Rule 34	13

Statutes

28 United States Code, Section 1254(1)	2
Labor-Management Relations Act, Section 203(d)	9
National Labor Relations Act (29 United States Code, Section 151, et seq.)	
Section 158(a)(1)	2, 3
Section 158(a)(5)	2, 3, 9, 10
Section 160(c)	5
Section 160(e)	5
Section 160(f)	5

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SAFEWAY STORES, INCORPORATED,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, Safeway Stores, Incorporated* (hereinafter referred to as the "Company") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing an order of the National Labor Relations Board (hereinafter referred to as the "Board" or the "NLRB") against the Company, which order finds the Company to have committed an unfair labor practice by refusing to furnish massive information to General Truck Drivers, Warehousemen, Helpers & Automotive Employees, Local No. 315 (hereinafter referred to as "Local 315" or the "Union").

---

*Pursuant to the Rules of this Court, the Petitioner states that the following companies are subsidiaries of Safeway Stores, Incorporated: Australian Safeway Limited; Safeway Food Stores Limited, a United Kingdom Corporation; Safeway Holdings, Inc., a Delaware Corporation; Safeway Stores, Incorporated, of Wyoming, a Wyoming Corporation; Canada Safeway Limited, a Canadian

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 622 F.2d 425 and appears at Appendix A, *infra,* pages A-1 to A-12. The judgment of the Court of Appeals appears at Appendix B, *infra,* pages B-1 to B-5. The Decision and Order of the National Labor Relations Board is reported at 236 NLRB No. 142 and appears at Appendix C, *infra,* pages C-1 to C-20.

JURISDICTION

The opinion of the Court of Appeals was entered on June 16, 1980 and its judgment was filed on August 18, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 158(a)(1) and (5)

"Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Corporation; Canada Safeway International, Finance Corporation, a Delaware Corporation; and Safeway Supermarket Gmbh, a West German Corporation. The following companies are subsidiaries of Canada Safeway Limited, a Canadian Corporation; Lucerne Foods Limited, an Alberta Corporation; McDonald's Consolidated Limited, a Canadian Corporation and Empress Foods Limited, a British Columbian Corporation. The Petitioner is not a subsidiary of any other company.

STATEMENT OF THE CASE

On June 17, 1977, the Union filed an unfair labor practice charge alleging that the Company had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (29 U.S.C. § 151 *et seq.*) (hereinafter referred to as the "Act" or the "NLRA") by declining to furnish the Union with all records evidencing the production of employees working within the Company's grocery warehouse between January 1, 1977 and June 15, 1977 (C.T. 3).[1] This information was sought in connection with a Company decision to disqualify seventeen (17) employees for permanent transfer to the grocery warehouse because of poor production. The Company declined to furnish the requested information unless and until an arbitrator determined that the complaint to which that information related could properly be made the subject of a grievance by the Union.

A complaint and notice of hearing was issued as a result of the Union's charge by the Regional Director for Region 20 of the NLRB on July 26, 1977 (C.T. 4-6). The Company filed an answer denying the substantive allegations of the complaint (C.T. 11-12). A hearing was conducted before Administrative Law Judge Russell L. Stevens on October 27, 1977 at which time the parties stipulated to the underlying facts in this case (R.T. 1-29). After receipt of written argument, Administrative Law Judge Stevens issued a Decision and Order on January 25, 1978 (C.T. 53). The

---

[1]References designated "A," "B," or "C" refer to the Appendices attached to this Petition. "C.T." refers to the first volume of the Official Record before the Court of Appeals for the Ninth Circuit. "R.T." refers to the second volume of the Official Record before the Court of Appeals for the Ninth Circuit.

Company filed timely Exceptions to the Administrative Law Judge's Decision and Order with accompanying written argument (C.T. 55-61).

On June 21, 1978, the NLRB issued a Decision and Order in which it affirmed the rulings, findings and conclusions of the Administrative Law Judge in their entirety (C-1). The Board further adopted the Administrative Law Judge's recommended Order (C.T. 62-63). Thereafter, the Board filed an application for enforcement of its Decision and Order which was dated September 18, 1978 (C.T. 64-65). Upon answering, the Company filed a Cross-Petition for Review of that same Decision and Order (C.T. 66-70). The Court of Appeals granted enforcement to the Board's Decision and Order, and placed reliance upon this Court's decision in *N.L.R.B. v. Acme Industrial Company, supra,* in so doing.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals herein gives this Court's decision in *N.L.R.B. v. Acme Industrial Company, supra,* an unforeseen and incorrect application. Since the situation posed in this case reoccurs constantly under collective bargaining agreements, review by this Court is imperative to assure that numerous employers are not forced to unfairly and improperly furnish information and documentation and thereby absorb substantial costs.

A. This Court's Decision In N.L.R.B. v. Acme Industrial Company Was Given An Unforeseen And Incorrect Application In The Present Case

The Board asserts that disclosure of the information requested by the Union was necessary in order to minimize conflict between the parties and conserve resources (C.T.

49). This assertion is flawed by the complete absence of any evidence in the record suggesting that production of the information sought would have averted the necessity to pursue arbitration, at least on the question of arbitrability, in this matter.[2] There are, however, even further reasons for finding that the Board's stated objectives (minimization of conflict and conservation of resources), are not served by the Board's Decision and Order in this case.

---

[2]Any court of appeals passing upon the validity of an NLRB Order must consider the record "as a *whole*" before determining the appropriateness of the Board's findings. A factual finding of the Board is binding upon the court, only if the court determines that finding to be supported "by *substantial* evidence" *after* the court has independently reviewed the record *in its entirety*. See 29 U.S.C. § 160(c), (e) and (f); *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 407 (1962); *Universal Camera v. N.L.R.B.*, 340 U.S. 474 (1951).

In the present case, there is *no* evidence in support of a factual finding which is highly critical to the Board's decision. The Board concluded that the Company was obligated to furnish the information when requested because that information was "potentially" relevant to an arguably grievable dispute. In reaching this conclusion, the Board asserted that such disclosure was necessary in order to provide the Union with an opportunity to review the merits of its position and determine if any grievance should be pursued (C.T. 63). The Board, in essence, found that if the information had been provided at the time requested, it might have induced the Union to drop its complaint against the disqualification of the seventeen transferees involved entirely.

This assertion and finding by the Board were entirely unwarranted in light of the record before it. The record in this case is completely devoid of any indication that review of the contested documents might conceivably have induced the Union to drop its complaints against the disqualification of the transferees involved. Quite to the contrary, the record in this case is replete with indications that the Union was committed to pursuing its complaint without regard to anything it might learn upon review of the documents requested.

The Union demanded that the Company produce *all* production records for *all* employees assigned to the grocery warehouse between January 1, 1977 and June 15, 1977 (C.T. 38; R.T. 19). Given the fact that a separate document is produced each day for each of these employees (R.T. 21-22), it is obvious that by this demand the Union sought massive documentation. The record further makes clear that on April 11, 1977, the Company altered its means for monitoring employee productivity (R.T. 21). The records maintained prior to that date were maintained through the utilization of a different system and, at the time of the Union's request, those records had been transferred to the Company's "salvage department" (R.T. 21). Obviously, the Company could not comply with the Union's demand without expending considerable time and resources. The collection, assembly and transportation of the documents encompassed by the Union's request would not have been a simple matter.

Despite the burdensome nature of the Union's request, the record makes clear that the Company would have furnished the information sought if the Union's right to file a grievance concerning the subject matter of its pending complaint were not in question (R.T. 8, lines 18-25; R.T. 9-10; R.T. 16, line 16-21; R.T. 17, lines 22-24). The Union's right to file a grievance regarding the subject matter of its complaint, however, was very substantially in question. The Company disqualified the employees involved for permanent transfer to its grocery warehouse in reliance upon a contractual provision which states that the Company may return potential transferees to their original department if dissatisfied with their performance as long

as this option is elected within the first 30 days of assignment in that new department (Section 4.G.1.d. set forth at A-2). In light of this fact, the Company decided that compliance with the Union's request would be a wasteful and senseless expenditure of resources. The Company, therefore, proposed that a specific procedure be utilized to resolve all differences between the parties relating to the disqualified transferees. This procedure was designed to resolve the dispute as expeditiously as possible with a minimal drain upon either party's resources.

The Company proposed that the permanent arbitrator under the grocery and frozen food warehouse agreement be asked to issue a binding interpretation of Section 4.G.1.d at the earliest possible opportunity. The Company suggested that an early determination on this question would be in the best interests of all parties. If the arbitrator ruled in the Company's favor, obviously the matter would be put to an end. If the arbitrator ruled against the Company on this threshold issue, the Company made clear that it would promptly gather the information requested *before* requiring the Union to proceed any further on the merits of its grievance.

Under the facts and circumstances of this case, the course proposed by the Company was clearly the best means to minimize conflict between the parties and assure conservation of their resources. The Union demanded that the Company undergo a very substantial burden which, as discussed above, had very little promise of bringing about an end to the dispute between the parties. On the

other hand, the Company requested that *both* parties *share* a small burden which had a very high likelihood of terminating the dispute once and for all. Quite simply, in this situation, the interests to which the Board has paid lip service, namely, minimization of conflict and conservation of resources, would not have been served by assembling and producing the information sought by the Union at the time it was requested. In this situation, the course of action desired by the Company was far more likely to bring about a prompt end to the dispute with a minimal expenditure of time and resources.

Facts evolving since the issuance of the Board's decision make clear that the procedure desired by the Company *was* the best means to promptly resolve the dispute between the parties with a minimal expenditure of time and energy. Although the Union resisted following the procedure desired by the Company (C.T. 14-17), the permanent arbitrator between the parties elected to proceed in the fashion desired by the Company. Thereafter, Arbitrator Kagel issued an award in which he decided that the Union did not have the right to file or process any grievance against the disqualification of an employee for permanent transfer into the grocery warehouse.[3] This award put the entire dispute between the parties to an end. Having received this binding interpretation of the contract between the parties, the Union is precluded from pursuing any grievance of the type involved in this case. It therefore has no need for and could not now make any use of the information sought in this case.

---

[3]The Award of Arbitrator Sam Kagel dated December 1, 1978, which was lodged with the Court of Appeals at the Board's request, appears at Appendix D, *infra*, pages D-1 to D-11.

Prior decisions of the Board provide ample authority for the appropriateness of deferral to the arbitration process under the facts and circumstances of this case. The Board recognized in *Collyer Insulated Wire,* 192 NLRB 837 (1971) that where the declaration of an employer's duties under Section 8(a)(5) hinges upon proper interpretation and application of rights set forth in a collective bargaining agreement, the dispute ought to be resolved in the manner which the contract prescribes. This policy assures that questions of contract interpretation will be resolved in the manner anticipated by the parties, with due consideration for bargaining history, past practices, and other factors normally advanced as relevant to an issue of contract interpretation. It also avoids overburdening the Board's resources in cases where the gravamen of the complaint relates to an issue of contract interpretation rather than the pronouncement of statutory rights. In arriving at this policy, the Board placed reliance upon the express statement of favor for the voluntary settlement of labor disputes through grievance and arbitration procedures which is contained within Section 203(d) of the Labor-Management Relations Act, as follows:

> " 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' "

Contrary to the decision of the Court of Appeals (A-9), the holding of the United States Supreme Court in *N.L.R.B. v. Acme Industrial Company, supra,* does *not* militate against deferral to arbitration in the present case.

In matter of fact, the rationale of that case is quite supportive of deferral in the present case. In *Acme Industrial Company, supra,* the union requested information relating to the removal of certain machinery from the company's premises. The company refused to furnish that information on the grounds that removal of the machinery had not violated the collective bargaining agreement in any manner. In essence, the company attempted to act as "judge and jury" on the merits of the union's potential complaint and refused to permit any independent evaluation of documents which would expose the controlling facts. This obviously put the union in a very difficult position. It had two choices. It could drop the matter entirely or proceed to an arbitration hearing where it would be forced to operate at a tremendous disadvantage. The company would be able to enter that hearing with full knowledge of the underlying facts while the union would be required to operate on the basis of speculation alone.

Not too surprisingly, the Board and the Supreme Court found that the company's refusal to supply the requested information violated Section 8(a)(5) of the Act because the union was not provided with an opportunity to intelligently evaluate the merits of its grievance before proceeding through all steps of the grievance and arbitration procedure. The Court expressed concern that adoption of the company's view in that case:

> ". . . would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. The expense of arbitration might be placed upon the union only for it to learn [that the facts did not support its grievance]." 385 U.S. at 438.

The facts in *Acme Industrial Company, supra,* were completely dissimilar from the present case. No dispute whatsoever existed between the parties in that case regarding the arbitrability of the union's grievance. The company apparently acknowledged that the union had the right to file a grievance regarding the subject matter of its complaint. The employer, however, simply refused to furnish information relevant to that grievance prior to an arbitration hearing. The course adopted by the Company in the present case was decidedly different. In the present case, the Company recognized its obligation to furnish information relevant to grievable disputes. It declined to furnish the information sought at the time it was requested solely because it had good cause for believing that the complaint to which this information related could *not* be made the subject of a grievance. For this reason, the Company requested that the threshold issue regarding the Union's ability to grieve on the complaint involved be resolved through arbitration before any resources were expended on the assembly and production of information.

In adopting this course, the Company clearly did not place the Union in the same adverse position which the Supreme Court found impermissible in *Acme Industrial Company, supra.* In that case, the union had only one choice if it wished to pursue its grievance. It was required to process the grievance through all stages of the grievance and arbitration procedure *without* any opportunity to review evidence of the facts upon which its grievance was based. The Union in the present case clearly did not suffer any disadvantage of this type. Throughout this case the Company made clear that if Arbitrator Kagel found the

Union's complaint against the disqualification of transferees to be a grievable matter, *all* relevant information would be promptly produced for the Union so it would have a full and fair opportunity to review that information *before* proceeding with its grievance on the merits of each individual case.

The foregoing makes clear that there was no danger of the inequitable situation disapproved by the Supreme Court in *Acme Industrial Company, supra,* arising in the present case as the result of deferral to arbitration. From the very initiation of this case, the Company made clear that it desired to resort to a limited arbitration on the threshold issue of arbitrability before any documents were produced solely to preserve the party's resources and attempt a prompt but judicious end to the dispute between them. The Company further made clear that the requested documents would be produced if the Union's complaints were found grievable well before any hearings on the merits of any individual employee's case. In light of these assurances proper application of *Acme Industrial Company, supra,* required the Board to defer to the arbitration process and intervene only if a dispute persisted over the production of documents following receipt of an arbitrator's decision on the issue of arbitrability.

In *Acme Industrial Company, supra,* the Court noted that a "discovery-type standard" is appropriate in determining a union's entitlement to information prior to the processing of a grievance (385 U.S. at 437). The course of action adopted by the Company in the present case is in complete conformity with this notion. This argument is

best understood if the actions of the parties to this case are analogized to the corollary actions which would be taken by parties similarly situated in a suit brought in federal court. In essence, when the Company requested to have the question of arbitrability resolved through a preliminary hearing, it was raising a threshold defense to the Union's claim which might be made the subject of a motion to dismiss or motion for judgment on the pleadings in a federal suit. The Union's request for production of records was analogous to a request for the production of documents under Rule 34 of the Federal Rules of Civil Procedure. While the Federal Rules of Civil Procedure do not provide for the automatic stay of discovery pending resolution of a motion to dismiss or motion for judgment on the pleadings, every federal court which has considered the appropriateness of such a stay has ruled that when a motion is pending which has the potential to dispose of the entire controversy, a motion to stay discovery unrelated to the pending motion should be granted to preserve both the resources of the parties and the resources of the court. See *O'Brien v. Avco Corporation,* 309 F.Supp. 703 (S.D.N.Y. 1969); *Allied Poultry Processors Company v. Polin,* 134 F.Supp. 278 (D.Del. 1955) and cases cited therein. By urging the Board to defer, the Company was, in essence, urging it to adopt the exact same course which has been found appropriate under the "discovery-type standard" imposed by the Supreme Court in *Acme Industrial Company, supra.* It sought to have any obligation to furnish information stayed unless and until the appropriate authority ruled against it on the threshold defense which was central to the pending dispute.

All the foregoing makes clear that deferral was the most appropriate means of judiciously resolving the dispute between the parties without infringing upon any of the statutory interests which the Supreme Court sought to protect in *Acme Industrial Company, supra.*

CONCLUSION

For the reasons set forth herein, the Company respectfully urges this Court to grant its Petition for Writ of Certiorari.

Dated: November 17, 1980.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
By WESLEY J. FASTIFF
KATHLEEN M. KELLY
Attorneys for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 78-3123

National Labor Relations Board,
Petitioner,

vs.

Safeway Stores, Inc.,
Respondent.

[Filed June 16, 1980]

OPINION

On Application for Enforcement of an order of
The National Labor Relations Board

Before: ANDERSON, SKOPIL, and THORNBERRY,
Circuit Judges

SKOPIL, Circuit Judge:

The National Labor Relations Board (the Board) petitions for enforcement of its order requiring Safeway Stores, Inc. (Safeway) to produce for inspection by General Truck Drivers, Warehousemen, Helpers & Automotive Employees, Local No. 315 (the Union) certain documents pertaining to a new employee productivity measurement system. 236 NLRB No. 142. The Union asked for the docu-

ments to help it process the grievances of seventeen employees who were returned to their original departments after transferring within Safeway's distribution center. Safeway contended the decisions to return the employees were not grievable. It refused to provide the requested documents, until grievability had been arbitrated. We grant enforcement.

FACTS

Safeway operates a large retail grocery warehouse and distribution center. The center is composed of several departments, including grocery warehouse, frozen food warehouse, "pre-pakt", and crate yard. In 1977 employees in these four departments were covered by three separate collective bargaining agreements between Safeway and the Union. Grocery warehouse and frozen food warehouse department employees were covered by one contract. Pre-pakt department employees were covered by a second contract, and crate yard employees were covered by a third. Each of the contracts contained a binding arbitration provision and provided for interdepartmental transfers, subject to certain conditions.

The transfer provision in the contract governing grocery warehouse and frozen food warehouse provides:

> "In the event that the employee is not able to perform the work satisfactorily within thirty (30) days or by his/her request within thirty (30) days, he/she shall return to his/her former position."

The provision in the pre-pakt employees' contract provides:

> "There will be a trial period of up to thirty (30) days to qualify, at the option of the Employer and the employee."

The crate yard employees' contract transfer provision said:

> "The thirty (30) day probationary period generally set forth for new employees is waived as it applies herein."

The parties agree that a transferee to the grocery or frozen food warehouse departments became subject to the contract governing employees of those departments. There is a dispute over the interpretation of these transfer provisions, alone or together.

In early May 1977 several employees transferred from other departments in the distribution center to the grocery warehouse department. Later seventeen transferees from the frozen food warehouse, pre-pakt, and crate yard departments were told they did not meet production standards and would be transferred back to their original departments. The seventeen employees filed grievances with the Union.

On June 15, 1977 the Union and Safeway held a grievance meeting. The Union requested to see all production records for grocery warehouse department swing shift regular employees, new employees, and the transferred employees for the period from January 1 through June 15, 1977.

About April 11, 1977 Safeway had instituted a new employee production measurement system. The old system measured productivity on a pieces-per-hour basis. The new

system, method-time-measurement (or MTM), involved recording and evaluating the time each employee required to complete work on an order.

Safeway refused to produce the records. It insisted that the return of transferees to their old departments within thirty days of transfer was within management's discretion and was not grievable under the contracts. The parties agreed to arbitrate the transfer dispute.

The Union persisted in its demand for the records. Safeway continued to refuse to produce them until the grievability issue was arbitrated. On June 17, 1977 the Union filed an unfair labor practice charge with the Board, complaining of Safeway's refusal to produce.

On October 27, 1977 a hearing on the unfair labor practice charge was held before an administrative law judge (ALJ). At the time of the administrative hearing the arbitration hearing had been scheduled, but the issues to be submitted to the arbitrator were still in dispute. Safeway insisted that the threshold issue of grievability was to be arbitrated first. The Union took the position that the entire dispute over the transfers was before the arbitrator. An agreement to first arbitrate only the grievability issue was not reached until a discussion immediately before the arbitration hearing on December 9, 1977.

On January 25, 1978 the ALJ filed his decision. He found in favor of the Union and recommended an order requiring Safeway to produce the requested records and to post an appropriate notice. On June 21, 1978 the Board

issued its decision and order. The Board affirmed the ALJ's rulings, findings and recommendations and adopted his recommended order.

On December 1, 1978 the arbitrator issued his award. He found the return of the transferred employees non-arbitrable.

The Board now seeks enforcement of its order. Safeway cross-petitions for review.

DEFERRAL TO ARBITRATION

Safeway contends that the Board should have deferred to the arbitrator's grievability decision before proceeding to consider the unfair labor practice charge. This contention takes two forms. First, Safeway argues that deference to arbitration in this type of dispute is the preferred course. Under the deference doctrine announced in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board should have deferred to arbitration in this case. Second, Safeway asserts that the grievability of the underlying dispute was essential to the relevance of the information requested. The Board should therefore have deferred to the arbitrator's finding of nongrievability. This second argument goes to the merits of the Board's order and not to the Board's procedure.

In *Collyer Insulated Wire* the Board recognized that where declaration of an employer's duties under section 8(a)(5) depends upon interpretation and application of a collective bargaining agreement, it may be appropriate for the Board to defer its own proceedings until the contract dispute has been resolved by the mechanisms established

by the parties. Thus, where a grievance and arbitration procedure has been agreed to, the parties should be encouraged to use it to resolve matters of contract interpretation.

On review we are limited to whether the Board abused its discretion in reaching its deferral decision. *Hawaiian Hauling Services, Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied* 431 U.S. 965 (1977). This court will not deny enforcement unless the Board clearly departs from its own standards or its standards are themselves invalid. *Id.*

As set forth in *Collyer*, two factors must be considered in determining whether the Board departed from its own standards when it refused to defer to arbitration in this case. The first is whether the issue before the Board is one of contract interpretation entrusted by the parties to resolution by arbitration in the first instance. The second factor is the likelihood that resort to arbitration will dispose of the controversy in a manner that does not contravene the purposes of the National Labor Relations Act.

The sole issue before the Board was whether or not Safeway had committed an unfair labor practice by refusing to produce the requested documents. This is primarily a statutory issue. The dispute submitted to arbitration did not concern the Union's right to the documents. It concerned whether Safeway had wrongfully returned the transferred employees for failure to meet production standards. We recognize that the grievability of the dispute was a threshold issue presented to the arbitrator. Grievability is *not* a threshold issue in the

unfair labor practice inquiry. The issue before the Board was not primarily one of contract interpretation.

The second factor in *Collyer* deference is the likelihood that arbitration will resolve the controversy. We now know that if the Board had postponed its action until the arbitrator made his award, the dispute over document production would have disappeared. We cannot say that the likelihood of this result was obvious when the Board made its decision not to defer. The question whether Safeway was entitled to await arbitration of grievability before it produced any documents was not, and could not be, resolved by arbitration.

In these circumstances we cannot say that the Board abused its discretion by refusing to defer to arbitration. The Board did not depart from its own standards. Those standards are not invalid.

THE DUTY TO PRODUCE DOCUMENTS

A violation of section 8(a)(5) of the NLRA can be predicated on the failure of either an employer or a union to give the other information necessary to enable the requesting party to intelligently evaluate grievances filed. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565, 17 L.ED.2d 495 (1967); *San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

Because it is not an unfair labor practice to refuse to furnish information having no relevance to any legitimate union collective bargaining need, the existence of a duty to produce information (*i.e.*, the relevance of the information

sought) depends on the factual circumstances of each particular case. *San Diego Newspaper Guild*, *supra* at 867.

> "[T]he Board's determination as to whether the requested information is relevant in a particular case is given great weight by the courts either because it is a finding of fact, which is conclusive if supported by substantial evidence, or because it is a finding on a mixed question of law and fact which is within the particular expertise of the Board." *Id.* (fns. and citations omitted.)

Safeway contends that the information sought by the Union was not relevant to any legitimate union collective bargaining need because the underlying dispute was not grievable. It insists it was entitled to await the outcome of arbitration on the issue of grievability before it was put to the expense of producing materials going to the merits of the dispute.

Safeway's argument is attractive. Its proposed course of action, it says, is analogous to a stay of discovery in federal district court pending disposition of a motion that may end the entire controversy. Such a stay should be granted in order to save the resources of the court and the parties. If the Board and this court followed Safeway's suggested method of proceeding, both parties would share the burden of finding out if Safeway alone must incur the very great expense of producing the requested documents. As Safeway concedes, however, such a stay is not automatic even in federal court.

Our task now is not to determine whether it would be a better policy to defer to arbitration on the issue of griev-

ability before an employer (or a union) is required to produce documents in connection with a grievance. That policy determination is for the Board. We have stated that the Board did not abuse its discretion. Our task is to determine whether there was substantial evidence on the record to support the Board's finding that Safeway had committed an unfair labor practice. *Universal Camera v. NLRB,* 340 U.S. 474 (1951); *Los Angeles Marine Hardware Co. v. NLRB,* 602 F.2d 1302 (9th Cir. 1979).

This case is governed by *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). In *Acme,* as here, the employer refused to supply requested information to the union. It insisted there had been no breach of the collective bargaining agreement. The Board found a violation of section 8(a)(5) of the National Labor Relations Act because the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed." The Seventh Circuit refused enforcement because the contract between *Acme* and the union contained a binding arbitration clause.

The Supreme Court framed the issue as

> "whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under § 8(a)(5)." *Id.* at 436.

In reversing the Seventh Circuit judgment, the Court concluded the Board need not wait.

Safeway attempts to distinguish *Acme* on the grounds that it offered to produce the requested information if the threshhold issue of grievability was resolved against it. In *Acme* the employer refused to supply any information

until the merits of the dispute had been resolved in arbitration. While *Acme* was a stronger case for the result reached, its rationale applies to the facts of this case.

The Board may order production of information relevant to a dispute if there is some probability that it would be of use to the union in carrying out its statutory duties and responsibilities. *Id.*, 385 U.S. at 437. One of these duties is to evaluate grievances and sift out unmeritorious claims. A union cannot be put to the expense of arbitration only to learn later that its complaint had no merit. *Id.*, 385 U.S. at 438-39.

We recognize that on the facts before it the Court in *Acme* was referring to arbitration of the merits and not arbitration of grievability. We do not find this difference dispositive. Safeway had no right to withhold from the Union the information the Union needed to evaluate the grievances. It is possible that the Union, with proper information, would have determined that the returned transferees failed to meet the old or new productivity standards. The Union might then have withdrawn its grievances without incurring the expense of arbitrating even grievabilty.[1] At the time the ALJ held a hearing on the Union's unfair labor practice charge the parties had not agreed to arbitrate the single issue of grievability. The Union was pro-

---

[1]The fact that the Union later pursued its attack on the new productivity standards through other grievances is not proof to the contrary. In any event, it was not a justification for Safeway's refusal at the time the information was first requested.

ceeding to arbitration of its grievances and had a right to the information it requested. The Board issued its order before the arbitrator made his award.

Safeway alternatively proposes and assumes that it was required to produce only information relevant to *grievable* disputes. The requirement of grievability is not now a part of federal labor law, and we decline to add it.

RELEVANCE OF THE REQUESTED INFORMATION

The only question remaining is whether the Board's finding that the information requested was relevant to the Union's duties is supported by substantial evidence on the record.

Certain types of information, such as wage data pertaining to unit employees, are so central to the employer-employee relationship that they are considered presumptively relevant. When such information is requested, the employer has the burden of showing lack of relevance. *San Diego Newspaper Guild, supra,* 548 F.2d at 867. We have already rejected Safeway's argument that the information was not relevant because the underlying dispute was not, or had not been determined to be, grievable.

The Union was processing grievances arising out of the unilateral return of seventeen transferred employees to their original departments. Safeway alleged the retransfers were made because the employees did not satisfy the new production requirements. The Union needed the production records to determine whether Safeway's allegations were correct and whether the new productivity stan-

dards could fairly be used. The information the Union requested was presumptively relevant to its collective bargaining duties. Safeway did not rebut the presumption.

Enforcement is GRANTED. The cross-petition for review is DENIED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 78-3123

National Labor Relations Board,
Petitioner,

vs.

Safeway Stores, Inc.,
Respondent.

[Filed 8/18/80]

JUDGMENT

Before: ANDERSON, SKOPIL, and THORNBERRY, Circuit Judges

This cause came on to be heard upon an application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, on June 21, 1978. The Court heard argument of respective counsel on February 14, 1980, and has considered the briefs and transcript of record filed in this cause. On June 16, 1980, the Court being fully advised in the premises, issued its opinion granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to perform its statutory bargaining obligation owing to General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter called the Union) as the exclusive representative of Respondent's employees in the unit described below, by refusing to furnish the Union with production records for all grocery warehouse employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied:

> All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their bargaining rights through the above-named Union, which are guaranteed to them in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action, which the Board has found necessary to effectuate the policies of the Act:

(a) Post at its physical plant office in Richmond, California copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 32 of the National Labor Relations

Board (Oakland, California), after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the receipt of this Judgment, what steps Respondent has taken to comply herewith.

Costs in this court in favor of the petitioner and against the respondent:

Costs:

28 copies of the petitioner's opening brief	$146.12
Records reproduction	11.50
	$157.62

Endorsed, Judgment Filed and Entered SO ORDERED:

Judges:

/s/ J. BLAINE ANDERSON
J. Blaine Anderson, CJ

/s/ OTTO R. SKOPIL
Otto R. Skopil, CJ

/s/ HOMER THORNBERRY
Homer Thornberry, CJ

/s/ RICHARD H. DEANE
Richard H. Deane
Clerk

NOTICE TO EMPLOYEES

[National Labor Relations Board Seal]

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to carry out the Order of the Board, the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves;

To form, join, or help unions;

To act together for collective bargaining or other mutual aid or protection;

To bargain collectively through representatives of their own choosing;

To refuse to do any or all of these things.

WE WILL NOT refuse to perform our statutory bargaining obligation owing to General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of our employees in the appropriate unit described below, by refusing to furnish the Union with information relevant and necessary for the proper prosecution of grievances filed on behalf of employees:

All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards and supervisors as defined in the Act.

We Will Not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their bargaining rights through the above-named Union, which are guaranteed to them in Section 7 of the Act.

We have furnished to the above-named Union production records for all grocery warehouse employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfers were denied.

SAFEWAY STORES, INC.
(Employer)

Dated .....

By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Breuner's Bldg., 2nd Floor, 2201 Broadway, P. O. Box 12983, Oakland, California 94604, Telephone No. 415-536-6122.

Appendix C

United States of America
Before The National Labor Relations Board

Case 32-CA-243
(formerly 20-CA-13028)

Safeway Stores, Inc.
and
General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

DECISION AND ORDER

On January 25, 1978, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[1] and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Re-

---

[1]We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing the Union's request for certain records it deemed relevant and necessary in connection with its processing of grievances on behalf of employees in the bargaining unit. In finding this violation, the Administrative Law Judge relied, in part, on the Board's decisions in *United-Carr Tennessee, a Division of TRW, Inc.*, 202 NLRB 729 (1973), and in *Worcester Polytechnic Institute*, 213 NLRB 306 (1974). Respondent contends that those cases are inapposite. Respondent argues that, unlike the fact here, in those cases the employers forced the unions to arbitrate the *merits* of the dispute without first supplying any of the relevant information sought by the unions. Respondent deems it legally significant that, in the instant case, it has not "forced" the Union to proceed to arbitration on the merits without supplying the requested information but instead has sought to have the issue of the *arbitrability* of the grievances determined, indicating that, if the arbitrator finds the issue arbitrable, it will supply the Union with as much of the information sought as Respondent deems relevant. Respondent contends that this excuses its refusal to supply any information at this time. We find Respondent's contention without merit. It is the teaching of *United-Carr Tennessee* and *Worcester Polytechnic* that, before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all. Viewed in such a light, Respondent's attempt to distinguish the two cases fails, and we agree with the Administrative Law Judge's conclusion that Respondent violated the Act in this proceeding.

spondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. June 21, 1978

John A. Penello, Member
Betty Southard Murphy, Member
John C. Truesdale, Member
National Labor Relations Board

(Seal)

United States of America
Before The National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Case No. 32-CA-243
(formerly 20-CA-13028)

Safeway Stores, Inc.
and
General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

Dorothy J. McNoble, Esq.,
for the General Counsel.
Littler, Mendelson, Fastiff & Tichy
by Wesley J. Fastiff and Kathleen M. Kelly, Esqs., for the Respondent.

DECISION

Statement of the Case

Russell L. Stevens, Administrative Law Judge: This matter was heard in San Francisco, California, on October 27, 1977.[1] The complaint, issued July 26, is based upon a charge filed June 17 by General Truck Drivers, Ware-

[1]All dates hereinafter are within 1977 unless stated to be otherwise.

housemen H lpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Union). The complaint alleges that Safeway Stores, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed by General Counsel and Respondent.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and at all times material herein has been, a corporation with a place of business located in Richmond, California, where it is engaged in the distribution and retail sale of food and drygoods products to and in various states, including the State of California. During the past calendar year Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000 from its business operations in the State of California, and purchased and received merchandise valued in excess of $50,000 directly from suppliers located outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce, and in a business affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Background

Respondent operates a large retail grocery distribution center in Richmond, California, where it warehouses grocery items to be shipped to its retail stores throughout the Bay Area. The center has a number of departments or divisions, including three that are involved herein, i.e., the frozen food warehouse, the pre-pakt warehouse and the grocery warehouse. Employees in some departments are covered by collective-bargaining agreements between the Union and Respondent, and some of those agreements contain provisions for transfers among departments.

Prior to April 1977, employee production in the grocery warehouse was measured on a pieces-per-hour basis. On or about April 1, Respondent instituted a new system in the grocery warehouse for measuring employee performance. Pursuant to the new system, Respondent keeps inventory and other records whereby it ascertains how long each employee requires to complete work on orders, and compares those times with predetermined standards. Such records have been kept since April 1 on all employees in the grocery warehouse, i.e., regular employees, new em-

ployees and employees transferred to the grocery warehouse from departments other than the grocery department.

In early May, 17 employees from other departments transferred to the grocery warehouse, pursuant to the contract between Respondent and the Union. Some of the employees were allowed to remain, while others were told that they did not meet production standards and would have to be transferred back to their original departments. Seventeen of the rejected transferees filed grievances with the Union. Those employees had transferred from the prepakt, the crate yard and the frozen foods departments. The Union and Respondent held a grievance meeting on June 15, at which the Union requested to see the production records for the new employees, the transferred employees and the regular employees, from January 1 to the time of the meeting. Respondent refused to provide the records at the time of the grievance meeting, and the Union requested that the grievances of the rejected transferees be arbitrated. Respondent agreed to arbitrate the dispute, and an arbitration hearing was scheduled for December 9. The Union has continued to request the information described above, and Respondent has continued to refuse production thereof.

Positions of the Parties

General Counsel contends that the Union has a statutory right to the requested information, since said records are necessary for evaluation and processing of the grievances filed by the 17 employees, which said grievances now are before an arbitrator.

Respondent contends that, under the contract clause relating to transfer of employees, it retains absolute discretion to send any transferred employee back to his original department within 30 days, and that the Union by contract waived its right to grieve any denial of transfer. Respondent further contends that, because it is not contractually bound to arbitrate any such grievance, the Union has no statutory right to request information such as that involved herein.

Discussion

1. The arbitral submission is not in dispute. Respondent and the Union agree that the arbitrator is asked to "dispose of all controversies between the Company and the Union relating to the disqualification of employees for transfer under the Company's MTM system." (Note: the new production record system)[2]

The Union's contention that the grievances of the employees are permitted under the bargaining agreement is not frivolous, nor is there any indication that the subject was negotiated or agreed upon, nor is there any specific waiver in the contract of such a right to grieve. These facts are not in dispute; they are recognized by Respondent, who stated in its brief: "The parties did not come to any agreement concerning the extent of the Union's right, if any, to grieve transfer disqualifications and therefore scheduled an arbitration to resolve outstanding differences in this issue."

---

[2]This statement is supported by the transcript of hearing, as well as documents and supporting papers filed pursuant to the Union's Motion to Reopen the Record, and replies thereto.

Respondent stated, at trial and in its brief, that it will seek during arbitration, first to have the arbitrator decide whether or not the Union is authorized by the bargaining agreement to grieve transfer denials. Respondent says its course of action then will be dictated by the arbitrator's determination on the grievability issue: if the arbitrator determines that the matter is grievable, Respondent then will "provide the Union with information that it requests concerning the relevancy of the rejection of the transferees.[3] However, Respondent says, if the arbitrator decides that the Union legally cannot grieve the transfer denials, "that should be the end of the case," and no information will be submitted to the Union.

The basic point relative to the arbitration is, that the matter has been submitted to the arbitrator for decision on all issues involved in the transfer denial. Respondent's proposed strategy before the arbitrator is not relevant. What Respondent at the present time contends will be its reaction to the arbitrator's decision that the Union can grieve the transfer denials, if such a decision is made, is both speculative and irrelevant. Respondent in the present proceedings challenges some of the information sought by the Union as irrelevant. It is apparent that a similar challenge will be made at arbitration, if the Union prevails on the grievability issue. Although Respondent says it will turn over to the Union certain information if it loses the grievability argument before the administrator, Respondent does not say it will turn over all the requested infor-

---

[3]Counsel for Respondent later stated that, if the arbitrator decided the matter is grievable, "then we will be pleased to give the Union any relevant information that it desires."

mation. Such a stance would result in further argument, delay and possibly litigation, even if the Union prevailed at arbitration on the grievability issue. Therefore, Respondent's present arguments place the Union in a situation of "heads I win, tails you lose," so far as the arbitration is concerned.

In view of the foregoing, the case at this juncture properly can be considered only on the basis that Respondent's denials of transfer for 17 of its employees have been grieved by the Union and the matter is before an arbitrator. All other considerations relative to the arbitration must be set aside as irrelevant to the issue of whether or not the Union is entitled under the Act to the information it requested.

2. The principal issue is whether, in this unfair labor practice proceeding, the Union is entitled to an order for production of information used by Respondent as the basis for denying employee transfer requests, or whether that question should be deferred to an arbitrator.

An employer is required, under the Act, to turn over to a union information potentially relevant and useful to the union in discharging its statutory responsibilities.[4]

The basic law on this subject was discussed in detail by Administrative Law Judge Lipton in *United-Carr Tennessee*,[5] which decision was adopted by the Board. The facts of *United-Carr Tennessee* are similar to those involved herein, in that respondent there refused to provide the

---

[4]*N.L.R.B. v. Acme Industrial Company*, 385 U.S. 432 (1967).

[5]*United-Carr Tennessee, a Division of TRW, Inc.*, 202 NLRB 729.

union with information relevant to an employee grievance; the arbitration process was instituted pursuant to the parties' bargaining agreement; thereafter, an 8(a)(5) unfair labor practice charge was filed by the union because of respondent's refusal to provide the requested information; a defense to the unfair labor practice charge was based upon *Collyer.*[6] Administrative Law Judge Lipton relied, in his decision, upon *Acme Industrial Co., supra,* and quoted therefrom to support his finding that ". . . where the employer withholds requested information which is potentially relevant in assisting a union intelligently to evaluate or process a grievance—unless the statutory right to such information is effectively waived in the contract—the Board's *Collyer* doctrine is not applicable to such an issue."

United-Carr Tennessee subsequently was discussed by Administrative Law Judge Harmatz in *Worcester Polytechnic Institution,*[7] a decision adopted by the Board. The Administrative Law Judge adopted the reasoning of *United-Carr Tennessee* in confirming the right of the union to relevant information relating to an employee grievance, even though arbitration also was being pursued, and stated, *inter alia:*

> . . . Furthermore, the fact that arbitration is now pending, which includes a request on the arbitrator that the College produce the information, hardly serves as a basis for distinguishing *United Carr, supra.* To hold otherwise would result in a nullification of statutory precedent entitling a labor organization to information potentially necessary to evaluate whether

---

[6]*Collyer Insulated Wire,* 192 NLRB 837.

[7]*Worcester Polytechnic Institute,* 213 NLRB 306.

> or not a grievance should be pursued. Harmonious bargaining relationships and industrial peace require strict adherence to statutory principles which are calculated to minimize disputes. In this case the Union's having elected to proceed to arbitration, on an uninformed basis, fails to furnish any cogent excuse for the College's refusal to provide information during the prearbitration stages and at a time when the Union, if such data were made available, might well have been persuaded that the facts supported the propriety of the layoff. Furthermore, by virtue of the College's contention, whatever the outcome of the arbitration proceeding, the failure to take steps required by the statute which might have averted a grievance would stand unremedied, and to withhold Board processes would, perforce, entail a condonation of the College's disregard of its statutory obligations, a result which would hardly contribute to effective implementation of the arbitral process in the future.

The facts now being considered are not different in any important respect from those considered in *United-Carr Tennessee* and *Worcester Polytechnic.*[8] No different holding is indicated.

3. The only remaining question is whether the information sought by the Union is relevant to the grievances of the 17 employees. Respondent contends that the relevant information consists only of "documents with regard to all the transferees, including those that attempted to transfer and were successful and those that attempted to transfer and

---

[8]At no stage of these proceedings has there been a contention that the Union waived its right to the requested information, and no such waiver is found.

who were unsuccessful," together with information concerning outside applicants who applied for employment and were accepted or rejected.

General Counsel seeks: (1) records relating to rejected and accepted transfer employees, which Respondent agrees are relevant;[9] (2) records relating to new employees, which Respondent agrees are relevant;[10] (3) records of regular employees, which Respondent contends are not relevant; and (4) performance records of employees between January 1 and April 1, which Respondent contends are not relevant.

Although a determination of relevance involves some subjective considerations, the subject permits objective analysis in this case. Courts and the Board consistently have taken a broad view of "relevance," and relate it to a "discovery-type standard."[11]

So far as (3) is concerned, the Union contends that the wording of the bargaining agreement relating to pre-pakt employees precludes Respondent from requiring the 30-day probationary period of them, and that they are to be treated as regular employees rather than new employees. In order to decide whether or not performance of the pre-pakt employees warrants arbitration of their rejection by Respondent, the Union first must compare the performance of those employees with that of regular employees. The relevance of the requested information is clear.

---

[9]This agreement was stated at trial.

[10]*Id.*

[11]*Acme Industrial Products, supra.*

So far as (4) above is concerned, it is clear that, if the Union intelligently is to decide whether or not to pursue some or all of the 17 employee grievances, the transfer refusals cannot be considered in a vacuum. Any changes of practice, and any implications to be drawn therefrom, can be ascertained only if pre-April practice can be compared with practice under the new system. The requested information must be available in order to make such comparisons, and to decide upon the basis of such comparisons, which, if any, of the grievances it will pursue. Whether or not the Union decides to pursue all, or only some, or none, of the 17 grievances through the arbitration process is irrelevant. The important point is whether or not the Union has all the facts to which it is entitled, in order to make its decision, and some of those facts are involved in this controversy. The requested information thus is relevant. In this connection, Respondent's argument that it is difficult to translate past records into present standards is not persuasive. Having established the fact of relevancy, it is incumbent upon both Respondent and the Union to exert their best efforts in resolving any translation problems that may be involved.

Based upon the foregoing, it is found that Respondent's refusal to produce for the Union's use the requested information violates Section 8(a)(5) and (1) of the Act, as alleged.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Respondent's activities set forth in section III above, occurring in connection with the operations of Respondent

described in section I above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Pursuant to Section 10(c) of the Act, it is recommended that Respondent be ordered to cease and desist from engaging in the unfair labor practices found, and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully has failed to perform its bargaining obligation by denying to the Union, as the exclusive representative of Respondent's employees in an appropriate unit, production records for all grocery warehouse employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied, I recommend that Respondent be ordered promptly to furnish such information to the Union.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By refusing to furnish to the Union production records for all grocery warehouse employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:

ORDER[12]

Safeway Stores, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to perform its statutory bargaining obligation owing to General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the exclusive representative of Respondent's employees in the unit described below, by refusing to furnish the Union with production records for all grocery warehouse employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied:

> All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their bargaining rights through the above-named Union, which are guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

---

[12]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Furnish to the Union production records for all grocery department employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied.

(b) Post at its physical plant office in Richmond, California copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated: January 25, 1978

/s/ RUSSELL L. STEVENS
Russell L. Stevens
Administrative Law Judge

---

[13]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Notice to Employees

[National Labor Relations Board Seal]

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to carry out the Order of the Board, the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves;
To form, join, or help unions;
To bargain collectively through representatives of their own choosing;
To act together for collective bargaining or other mutual aid or protection;
To refuse to do any or all of these things.

We Will Not refuse to perform our statutory bargaining obligation owing to General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of our employees in the appropriate unit described below, by refusing to furnish the Union with

information relevant and necessary for the proper prosecution of grievances filed on behalf of employees:

> All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards and supervisors as defined in the Act.

We Will Not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their bargaining rights through the above-named Union, which are guaranteed to them in Section 7 of the Act.

We Will furnish to the above-named Union production records for all grocery warehouse employees from January 1, 1977 to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfers were denied.

SAFEWAY STORES, INC.
(Employer)

Dated .....

By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Clorox Bldg., 7901 Oakport St., P. O. Box 2410, Oakland CA 94621, Telephone Number: (415) 632-7202.

Appendix D

Teamsters Local No. 315,

Complainant,

and

Safeway Stores, Inc., Richmond Distribution Center (Grocery & Frozen Food Warehouses),

Respondent.

Re: Rejection of Transfers
Pursuant to Work Rating System

OPINION AND DECISION OF SAM KAGEL,
Arbitrator

San Francisco, California, December 1, 1978

Background:

At the hearing of this case held December 9, 1977, the Arbitrator, by way of background and determining the specific issue in this case, made the following statement:

> "The Arbitrator: Let's go on the record, please, and note that this is an arbitration between Teamsters Local 315 and Safeway Stores. Let me see if I can state what I understand the dispute is in this particular instance.
>
> "Specifically it refers to 17 employees who were transferred from units covered by Teamsters Local 315 agreements into the grocery warehouse, which is also covered by a Local 315 agreement.

"After their transfer the company has transferred them back into their original units, and the contention of the company is that when those persons were transferred into the grocery warehouse they were probationary employees and that, therefore, the company had a right to move them back where they came from and that, therefore, the grievances are not arbitrable.

"Is that correct so far?

"Ms. Kelly: That's correct.

"The Arbitrator: All right. The union's contention is, I gather, that the probationary provision does not apply to these particular transferees—

"Mr. Silbert: That's correct.

"The Arbitrator: And the matter of whether or not they should have been transferred would relate to the merits of this case which has to do with the application of the work rating system production standards.

"Is that correct?

"Mr. Silbert: That's correct.

"The Arbitrator: Today, as a result of our off-the-record discussion, we are going to hear the question of arbitrability.

"Ms. Kelly: Correct. May I clarify one thing?

"The Arbitrator: You certainly may.

"Ms. Kelly: Just so that your summary of the company's position won't mislead anyone, we are not suggesting that these transfers are to be treated like new employees who serve a probationary period. We are contending that a separate provision in the contract creates a trial period of 30 days for those employees.

"The Arbitrator: I'm glad you clarified that.

"Mr. Silbert: I think there should be one other statement on the record, and that is that we have agreed, in off-the-record discussions, that notwithstanding whatever decision comes out on the arbitrability question the record in this case will remain open to determine what effect, if any, a decision in the arbitration involving the propriety of the company's work rating system would have to this dispute.

"The Arbitrator: I indicated that I would state that at the conclusion of the hearing this morning, that is a correct statement.

"Ms. Kelly: Is it also understood that the fact that the record remains open will not preclude a ruling on this question of arbitrability?

"The Arbitrator: Not necessarily preclude.

"Mr. Silbert: That's correct." (Tr. 3-4)

Issue:

The issue in this case is whether or not the grievance of 17 Employees, who were transferred from units of Teamsters Local 315 into the Grocery Warehouse and were then transferred by the Company back into their original units, is arbitrable.

Agreement Provisions:

A. *Grocery and Frozen Food Warehouse Agreement*

"4. *Seniority*

"A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) working day trial basis, during which

period he/she may be discharged for any reason which, in the opinion of the Employer, is just and sufficient; provided, however, that there shall be no discrimination against employee (sic) because of union membership or activities. Upon completion of the thirty (30) working days prior to the date the employee completed his/her probationary period."

* * *

"G.1.d. In the event that the employee is not able to perform the work satisfactorily within thirty (30) days or by his/her request within thirty (30) days, he/she shall return to his/her former position."

B. *Pre-Pakt Department Agreement*

"ADDENDUM "A"

"TRANSFER TO OTHER DEPARTMENTS

"Effective with positions that are open under the Drivers, Platform and Automotive Truck Service Master Agreement and the Grocery and Frozen Food Warehouse Agreement, Pre-Pakt Department employees will be allowed to bid for these openings after the proper unit has run through their bids and the Pre-Pakt employee shall have a nine (9) month retention of seniority in Pre-Pakt Department only if laid off for lack of work at the new department and the nine (9) month period shall start from the first date of transfer.

"Openings shall be posted and all employees shall be notified of the day the notice is posted.

"However, there will be a limit of twelve (12) employees per year and no more than six (6) such jobs bid in any given month, or more at Plant Manager's option.

"Such employees who successfully bid shall commence at the bottom of the seniority list in the department to which they become attached. There will be a trial period of up to thirty (30) days to qualify, at the option of the Employer and the employee. If the employee voluntarily withdraws from the transfer, the employee will not be allowed to bid again for a period of three (3) years.

C. *Crate Yard Department Agreement*

"ADDENDUM ONE

"TRANSFER TO OTHER DEPARTMENTS

"Effective with positions that are open under the Drivers, Platform and Automotive Truck Service Master Agreement and the Grocery and Frozen Food Warehouse Agreement, Pre-Pakt Crate Yard employees will be allowed to bid for these openings after the proper unit has run through their bids and the Pre-Pakt Crate Yard employees shall have a nine (9) month retention of seniority in Pre-Pakt Crate Yard, only if laid off for lack of work at the new department, and the nine (9) month period shall start from the first date of transfer.

"However, there will be a limit of six (6) employees per year and no more than three (3) such jobs bid in any given month.

"Such employees who successfully bid shall commence at the bottom of the seniority list in the department to which they become attached. The thirty (30) day probationary period generally set forth for new employees is waived as it applies herein. Said employees shall carry with them their bank of sick leave, if any, and shall maintain their prior seniority dates

for purposes of length of vacation only. However, upon completion of the above procedure they will be paid prorated vacation in whatever amount is due and shall not be entitled to a vacation in the new department until after one (1) year of service therein." (Er. Br. pp. 4-6)

Discussion:

It was stipulated that each of the individuals concerned in this case was returned to his Department before serving 30 days in the Grocery Warehouse (Tr. 9).

A further stipulation was entered into, as follows:

"Mr. Silbert: I would propose one stipulation and that is that over the years there have been a number of people transferred from other departments into the grocery warehouse, and that the only people who have been sent back to their original bargaining units have been the two that we have discussed today, Mr. Hernandez and Mr. Castillo.

"Ms. Kelly: I think that stipulation is correct, in that at least several frozen food employees have voluntarily decided to go back to their original department, although I know of no frozen food employees that have been disqualified and sent back by the company.

"Mr. Silbert: I amend the proposed stipulation; that other than the two people we have talked about today no people who have transferred into the warehouse previously have been disqualified by the company and then sent back to their original bargaining units as a result of that disqualification.

"The Arbitrator: Unless they volunteered.

"Mr. Silbert: Unless they voluntarily agreed to do so.

"The Arbitrator: Is that correct?

"Ms. Kelly: To the best of my knowledge." (Tr. 25-26)

The Company submitted a brief in this case, dated January 11, 1978, received by the Arbitrator on January 16, 1978. The Union did not submit a brief although it stated it would do so. Considering the passage of time, it must be concluded that the Union has determined not to submit a brief in this case.

Background:

The background of this case is set forth under Statement of Facts by the Employer and reads, as follows:

". . . Two of the Grievants in this case transferred from one department (Frozen Foods) to another (Grocery Warehouse) covered by the Grocery and Food Warehouse Agreement (Joint Exhibit No. 1; Joint Exhibit No. 5). Three of the Grievants attempted to qualify for permanent transfer to the Grocery Warehouse pursuant to a contractual understanding set forth in the Crate Yard Department Agreement (Joint Exhibit No. 3; Joint Exhibit No. 5). The remaining Grievants attempted to qualify for permanent transfer to the Grocery Warehouse pursuant to a contractual understanding set forth in the Pre-Pakt Department Agreement (Joint Exhibit No. 2; Joint Exhibit No. 5; Joint Exhibit No. 6).

"The Company elected to return each of the Grievants to his or her previous department within thirty (30) days of the employee's initial assignment to the

> Grocery Warehouse (Tr. 9, lines 5-10). The parties agreed that the sole reason these employees were disqualified for permanent transfer to the Grocery Warehouse was their inability to perform the work at a level which satisfied Company standards within the first thirty (30) days of assignment there. . . ." (Er. Br., pp. 7-8)

The Company, in sending the Grievants to their original place of employment, relied on Section 4.G.1.d. of the Grocery and Frozen Food Warehouse Agreement. That provision reads, as follows:

> "In the event that the employee is not able to perform the work satisfactorily within thirty (30) days or by his/her request within thirty (30) days, he/she shall return to his/her former position."

The Pre-Pakt Department Agreement provides, as a result of the 1976 negotiations, the following language:

> "There will be a trial period of up to thirty (30) days to qualify, at the option of the Employer and the employee."

With reference to the Frozen Food Employees who transferred to the Grocery Warehouse, they are governed by the Grocery Warehouse Agreement as it relates to their transfer, and that Section A.4.G.1.d. is a provision which gives to the Company a unilateral right and gives to the Employee a unilateral right. In the case of the Company, it is to return a transferee who does not perform work satisfactorily within 30 days to his or her former employment, and it independently gives to the Employee the right to return to his or her former position. So, for whatever reason that person may determine, he or she may return within 30 days after the transfer.

To accept the view of the Union that the arrangements under that provision becomes one subject to arbitration would, in effect, nullify the clear intent of the Parties to give, insofar as transferees are concerned under that provision, the independent unilateral right to act in one case by the Employer and in the other case by the Employee.

As to the Pre-Pakt Employees who sought transfer and did transfer, they are governed by Section 4.G.1.d. of the Grocery and Frozen Food Warehouse Agreement. The Pre-Pakt Agreement itself provides, "There will be a trial period of up to thirty (30) days to qualify, at the option of the Employer and the employee."

The record indicates that that clarification was related to Section 4.G.1.d., and the use of the words "at the option" would indicate again that the Employer was retaining a unilateral right to make a judgment as to whether the Employee should remain in the job to which the Employee transferred and the Employee had an independent right to go back to his or her original position.

As to the Crate Yard Employees, they, when assigned to the Grocery Warehouse, are subject to the conditions set forth in the Grocery Warehouse Agreement and what has already been stated with reference to Section 4.G.1.d. applies to them.

With reference to the language which appears in the Crate Yard Agreement, "the thirty (30) day probationary period generally set forth for new employees is waived as it applies herein," does not change the application of

the Grocery Warehouse Agreement to persons who transfer under that Agreement to the Grocery Warehouse. Clearly, the Crate Yard Employees were to have the right to return to the Crate Yard if their work performance was found unacceptable or if they decided within 30 days that they wanted to go back, and that protection can only be provided by Section 4.G.1.d. Nothing in the record supports the possible conclusion that would result from the Union's position in this case, namely that if the Company would not have the alternative of returning Crate Yard Employees to the Crate Yard under 4.G.1.d., but must retain them under the Grocery Warehouse Agreement and make such employees subject to possible termination on the basis that their work was not satisfactory. It cannot be concluded that the Parties intended such a possible occurrence.

Summary:

The actions taken by the Company in the instance of these transfers, as indicated hereinabove, result from a provision of the Agreement which gives the Employer the independent right to unilaterally return the transferee to his or her original place of employment. It equally gives the right to the Employee on his own motion to do the same if he or she desires to do so. It cannot be conceived that the Employer's right to unilaterally do what it did in this case is subject to arbitration. For, if that were the case, if an Employee wanted to return back to his own original place of employment, the Employer would have a right to protest if it so chose for whatever reason it may have in mind at that time. It becomes clear because of the

nature of the rights retained by each Party under the provisions discussed and analyzed hereinabove that the matters relating to the actual transfer, either into Grocery Warehouse or back to their original units, resulting from the Employer's action or from the Employee's action, is not arbitrable.

Decision:

The Grievants' cases in this instance are not arbitrable.

/s/ SAM KAGEL
Arbitrator